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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LAVANCE MCNAIR,

Defendant and Appellant.

B217055

(Los Angeles County  
Super. Ct. No. NA072304)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Arthur Jean Jr., Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

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This case is before us a second time. Lavance Bruce McNair entered a negotiated no contest plea to one count of petty theft with a prior theft-related conviction. On appeal, McNair contended, the People acknowledged and we agreed the trial court committed reversible error by failing to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) prior to sentencing. We reversed the judgment and remand with directions for the trial court to hold a *Marsden* hearing and to conduct further proceedings as authorized by law. (*People v. McNair* (Oct. 6, 2006, B200367)).

### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 20, 2006, McNair left a Top Valu Market in Long Beach with a backpack of merchandise for which he did not pay. He was detained by the store's loss prevention officers until Long Beach Police Officers arrived and arrested him.

On December 18, 2006, McNair was charged by information with two counts of second degree robbery (Pen. Code, § 211)<sup>1</sup> (counts 1 and 2) and one count of petty theft (§ 484, subd. (a)) with an allegation he had suffered 11 prior theft-related convictions (§ 666) (count 3). The information further alleged McNair had previously served 13 separate prison terms for a felony (§ 667.5, subd. (b)).

Prior to being arraigned, McNair waived his right to counsel and the court granted his request to proceed in propria persona. (*Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].) McNair represented himself at the preliminary hearing. On March 2, 2007, McNair relinquished his propria persona status; the public defender's office was appointed to represent him.

On April 30, 2007, McNair waived his right to a jury trial and agreed to plead no contest to committing petty theft with a prior theft-related conviction (count 3) and to admit two prior prison term enhancement allegations. In exchange, McNair was to be sentenced to five years in state prison. The trial court found McNair's plea was freely and voluntarily entered, and there was a factual basis for the plea. Defense counsel

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

joined in the plea and stipulated to a factual basis from the police report. Counts 1 and 2 were dismissed on the People's motion.

At the probation and sentencing hearing on May 31, 2007, McNair produced a written motion to withdraw his plea. In his motion, McNair asserted he and his defense counsel had "several conflicts of interest"; his defense counsel "had not adequately investigated [McNair's] case"; and had rendered "ineffective assistance of counsel on grounds for withdrawing the plea"; and McNair was "raising a *Marsden* in the court room on record to show ineffective assistance of counsel." Defense counsel read the motion and informed the court that McNair wanted to have a *Marsden* hearing.

The court reviewed the motion, and spoke with McNair, who persisted in his complaints about the adequacy of appointed counsel. The trial court declined to consider McNair's claims any further and imposed the agreed-upon sentence of five years in state prison, consisting of the three-year upper term for petty theft with a prior theft-related conviction, plus one year for each of two prior prison term enhancements. The remaining prior prison term enhancements were stricken for purposes of sentencing only.

McNair filed a timely notice of appeal on June 25, 2007; his request for a certificate of probable cause was denied. After this court issued an order for peremptory writ of mandate (*McNair v. Superior Court* (Aug. 13, 2007, B200811)), the superior court granted McNair's request for a certificate of probable cause.

As a result of McNair's first appeal, we reversed the judgment and remanded with directions for the court to conduct a *Marsden* hearing, and to reinstate the judgment if: (1) the *Marsden* motion is denied; (2) the *Marsden* motion is granted but substitute counsel declines to file a motion to withdraw the plea or other appropriate motion; or (3) the *Marsden* motion is granted but the trial court denies the motion to withdraw the plea or other appropriate motions by substitute counsel. The remittitur issued on December 17, 2008.

On remand, the trial court conducted a *Marsden* hearing as directed on February 5, 2009 and denied McNair's *Marsden* motion. The court reinstated the judgment and reimposed the previously negotiated five-year state prison sentence. The court ordered

McNair to pay a \$20 security fee and a \$200 restitution fine and imposed but suspended a parole revocation pursuant to section 1202.45.

On June 26, 2009, we granted McNair's application for relief from default for failing timely to file a notice of appeal and directed the clerk of the superior court to accept a timely filed notice of appeal from McNair within 20 days. Thereafter McNair timely filed his notice of appeal on July 6, 2009.

We appointed counsel to represent McNair on appeal. After examination of the record counsel filed an opening brief in which no issues were raised. On January 26, 2010, we advised McNair he had 30 days within which to personally submit any contentions or issues he wished us to consider. We have received no response to date.

We have examined the entire record, including the *Marsden* hearing transcript, and are satisfied McNair's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P.J.

JACKSON, J.